No. 11,797

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STATE OF CALIFORNIA,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

FRED N. HOWSER,
Attorney General of the State of California,
HAROLD B. HAAS,
Deputy Attorney General of the State of California,
MIRIAM E. WOLFF,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 11,797

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

INTRODUCTION.

The first point in appellee's brief with which we desire to take issue is its statement of the question which is presented on this appeal. This statement of appellee assumes one of the very questions which are at issue before this Court, to-wit: "whether the land of the State of California was retained for the sole purpose of providing ingress and egress." We do not concede that this is the case.

On the contrary, we believe that the question before the Court is:

> "What is the proper value to be ascribed to land retained by the State of California in full fee ownership where the land at the date of the

taking lies 20 feet under the waters of the Bay, and where the adjacent property had been conveyed out of the State of California pursuant to an Act of 1868 (Statutes 1867-8, page 716)."

ARGUMENT.

I.

APPELLEE'S CONTENTION THAT THE STRIPS OF LAND WERE "STREETS" IS UNFOUNDED.

Appellee's argument presupposes that the strips of land, which are the subject of this litigation, were retained for the purpose of providing access for ingress and egress to the lots. It is our position that even if this Court finds that situation to be the fact the State is still entitled to more than nominal value by reason of the fact that the land was not used for ingress and egress and was in exactly the same condition as the adjacent property. However, we do not concede that the strips were retained only for ingress and egress. The statute under which these conveyances were made reads in part as follows:

> "* * * After the establishment of the water line front as above provided, the Commissioners shall have all the property lying within the same belonging to the State surveyed, subject to the approval of the State Board, into lots and blocks in accordance with the official map survey of the City of San Francisco, *reserving so much thereof for streets, docks, piers, slips, canals, drains or other use necessary for the public convenience and the purposes of commerce, as in their judgment may be required,* and have two maps of

the same prepared showing the property as resurveyed to the water line front, the streets, blocks, reservations, and everything necessary to be shown by such maps; * * *

* * *

"After the Commissioners shall have complied with the provisions of section four of this Act, they shall proceed to sell at public auction, and as hereinafter provided, in some public place in the City of San Francisco, all the right, title and interest of the State of California in and to the property in the lots described in section four. * * *" (Italics ours.)

California Statutes, 1867-8, p. 716.

In accordance with the mandate of the statute the State conveyed certain portions of the area of the condemnation and by specific direction of the statute retained title to part of the area, some of which latter portions are the subject of the State's claim in this litigation.

Appellee seeks to rely on the case of *McGinn v. State Board of Harbor Commissioners,* 113 Cal. App. 695, stating that in the *McGinn* case the California Court upheld the right of a lot owner in the submerged area to access from the street and contends that the *McGinn* case is indistinguishable from the case at bar.

We believe that the District Court reached a correct result in the *McGinn* case although in doing so the Court indulged in some unfortunate dictum, which dictum was totally unnecessary to the holding

of the case, and in all probability it is this dictum that has confused the appellee. The Court in the *McGinn* case does state that the Act of 1872 constituted a dedication. However, such a holding is directly contrary to the holding of the Supreme Court of this State in *Diggins v. Hartshorne,* 108 Cal. 154, where the Supreme Court stated:

> "The terms of section 1 of the act do not require that the streets laid down upon the map shall have been actually opened and dedicated to public use before the supervisors could order their improvement. * * *
>
> "While the declaration in the statute that the streets laid down upon the designated maps are open public streets, 'for the purpose of this law,' did not of itself make them in fact public streets if they were not so already, yet these spaces upon the maps were thereby identified as objects of reference by which to describe the limits of any improvement which might be made."

Neither *Diggins v. Hartshorne,* 108 Cal. 154, nor *People v. Williams,* 621 Cal. 498, which contained a similar holding, were cited in the *McGinn* case and were obviously overlooked by the Court. However, the dicta referred to is completely unnecessary to the decision.

In the *McGinn* case the judgment granted an injunction to an abutting lot owner against an obstruction of the street in front of the lot *where both the lot and the street had been reclaimed,* and the street had been in use for approximately twenty-five years. This fact alone constitutes a primary distinction be-

tween the *McGinn* case and the case at bar. Therefore, the decision of the District Court holding that the lot owner had a right to unobstructed ingress and egress from his property was clearly right under the law of this State.

Davidow v. Griswold, 23 Cal. App. 188;
Archer v. Salinas City, 93 Cal. 43;
Berton v. All Persons, 176 Cal. 610;
Eltinge v. Santos, 171 Cal. 278.

The second point of distinction between the *McGinn* case and the case at bar is that the *McGinn* case involved Channel Street between Seventh Street and Carolina Street, and this area was expressly dedicated by the Legislature as an open public canal by the Act of March 26, 1868 (Stats. 1867-68, p. 355).

This Act referred only to Channel Street and had no application whatever to any of the area involved in this litigation. Insofar as the *McGinn* case opinion asserts that a sale of lots from a map thereby irrevocably dedicates the streets shown on the map to *public use,* it again misstates the law. In fact, its own language shows such misstatement:

> "Having authorized the preparation of the map and having approved the map as filed with the streets, lanes, and other public places delineated thereon, the state stood *in the same position as all owners of private property,* and must therefore be deemed to have dedicated to public use all the public highways and places as delineated upon that map. Having immediately sold these lots in accordance with the map, the state was without authority thereafter to withdraw

> from public use any of the streets shown upon the map."

But, in fact, the right of such a private seller to withdraw the dedication so far as the public is concerned has long been established in this State.

> *Los Angeles v. Kysor,* 125 Cal. 463;
> *City of Anaheim v. Langenberger,* 134 Cal. 608;
> *City of Sacramento v. Clunie,* 120 Cal. 29;
> *Archer v. Salinas City,* 93 Cal. 43.

In summary, therefore, it can be pointed out that the decision in the *McGinn* case is clearly sound by reason of the fact that the area there in question has been reclaimed and used by the public under what at least amounted to color of authority for a period of from twenty or twenty-five years, that the property owners' rights to continue to have unobstructed passage was clearly established and the public's right to use the street had been clearly established. But the determination that the Acts of the Legislature did not constitute a dedication and that the sales by the Tidelands Commissioners did not constitute a dedication, had already been determined adversely to the dicta in the *McGinn* case by the Supreme Court of this State in the case of *People v. Williams,* 64 Cal. 498 and in the case of *Diggins v. Hartshorne,* 108 Cal. 154, neither of which is cited in the *McGinn* case. In the light of these authorities by our highest Court, appellee can take no comfort from the dicta of the District Court of Appeal in the *McGinn* case. It should also be borne in mind that the portion of Channel Street involved in the *McGinn* case was

an open public street, whereas the area involved in the case at bar lay from ten to twenty feet under the waters of the Bay of San Francisco, which fact, in itself, constitutes a primary distinction between the two cases. We are at a loss to understand how appellee can seriously contend that the area involved in the case at bar was impressed with an easement.

Appellee further argues that the abutting lot owners have a right appurtenant to their lots to have the areas laid down on the map as streets maintained as such, and from that premise appellee contends that the street areas are impressed with street easements, and that therefore their value is nominal. The cases cited by appellee for this proposition all dealt with situations where the streets were then available for use as such. The case at bar has a clear distinction in that it involved an area where reclamation was a physical condition precedent to the use of the streets as such. It has not been denied by the State that if the land were reclaimed the *potential* easement of the lot owners might ripen into a full easement. That is precisely the situation which occurred in the *McGinn* case; but if reclamation had taken place other values and factors would be present which would put an entirely different face upon the values of the State's interest in the area. If it is speculative to value the lots as though reclamation were completed, it is just as speculative to value the State's interest in the areas mapped as streets as though the reclamation had been completed. In the latter event the State would have other, much greater and com-

pensating values, and could willingly forego the value claimed for this area.

The cases relied upon by appellee have clearly pointed out that while the purchasers of the lots had a right to use the streets for purposes of ingress and egress, the sale itself did not constitute a public dedication.

In *Danielson v. Sykes,* 157 Cal. 686, 689, cited by appellee, the Court states:

> "It is a thoroughly established proposition in this state that when one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, *and that this private easement is entirely independent of the fact of dedication to public* use, and is a private appurtenance to the lots, * * *". (Italics supplied.)

II.

APPELLEE'S DISTINCTION OF THE CASE OF UNITED STATES v. BENEDICT, 261 U. S. 294 IS IMPROPER.

Appellee has cited eight cases to support its contention that the rule laid down in *United States v. Benedict,* 280 Fed. 76 (affirmed 261 U. S. 294), is no longer followed by the Courts. Not one of the cited cases are applicable to the situation either in the case at bar or in the *Benedict* case, and in citing

these cases as authority appellee has consistently overlooked the fundamental distinction between the *Benedict* case and the cases cited. It has been our contention throughout that the *Benedict* case is parallel with the case at bar, and so we likewise contend that the distinction which appellee endeavors to draw between the cases cited and the case at bar is unwarranted.

As we have pointed out at considerable length in our opening brief, in the *Benedict* case the land reserved for streets lay under the water and had never been used or opened as streets. Parenthetically, we again wish to note that the case at bar is stronger than the *Benedict* case since in the *Benedict* case the land owned by the city could only have been used as streets and we deny that such was true in the case at bar. However, appellee has cited as contrary to the *Benedict* case the following, all of which may be readily distinguished.

In *Mayor and City Council of Baltimore v. United States,* 147 Fed. (2d) 786, the Court states:

> "The nature of the interest owned by the municipality in public streets and alleys, as contrasted with the interest of the abutting owners, has been defined by the courts of Maryland, and the decisions show that the view maintained by the City is untenable. The interest of the City in public streets and alleys is not for all practical purposes equivalent to a fee. It is true that when land is dedicated to the City for street purposes, the City acquires as trustee for the public not only the easement of passage but also

> the right to grade and improve the surface, and to lay drains, sewers and pipes for various utilities beneath the surface of the land. But, on the other hand, the person in whom the fee resides, e. g., the abutting owner, retains substantial rights notwithstanding the dedication. He may maintain trespass or ejectment or waste for the invasion of his rights, such as the unauthorized deposit of material or rubbish upon the soil" (cases cited); "he may demand compensation for an additional servitude, for example, the erection of telephone poles" (cases cited), "and he retains riparian rights in adjacent waters even when the public authority requires an easement for a highway along the shore" (cases cited). "In other words, the interest of the abutting owner is not a contingent interest but a present subsisting ownership of the fee, subject only to the easement in favor of the public; and if, for any reason, the easement is abandoned, the entire beneficial interest in the land reverts to him." (Cases cited) (147 Fed. (2d) 786, 788-9.)

In *United States v. Prince William County,* 9 F. Supp. 219 (aff'md 79 Fed. (2d) 1007), the award of the area lying under the street was given to the adjoining property owner since under the law of Virginia the adjoining owner took to the center of the street.

In *United States v. Los Angeles County,* 163 Fed. (2d) 124, the county owned only an easement and did not own the fee.

The above three cases are distinguished from the case at bar since the rule is well established in California that the grantee of a metes and bounds description to a line of a street takes title only to the line.

Warden v. South Pasadena Realty Co., 178 Cal. 440, 442;

Berton v. All Persons Etc., 176 Cal. 610, 614;

Joens v. Baumbach, 193 Cal. 567, 571;

Macadamizing Co. v. Williams, 70 Cal. 534, 541;

Severy v. C. P. R. R. Co., 51 Cal. 194, 196.

In the following cases cited by appellee, the Court reiterates its well-established rule that where a public street or road is taken the measure of compensation is the substitution of new facilities for the ones condemned.

Woodville v. United States, 152 F. (2d) 735;

Jefferson County v. Tennessee Valley Authority, 146 F. (2d) 564;

United States v. 0.866 of an Acre of Land, 65 F. Supp. 827;

United States v. Alderson, 53 F. Supp. 528.

All of these cases cited above are the ones cited by appellee under the proposition that the rule of the *Benedict* case is no longer followed. However, in each and every one of the cited cases the streets condemned were used as streets and roads and had long been impressed with an easement. None of these cases are parallel either to the case at bar or to the *Benedict* case for in both of the latter the so-called streets had never been used for ingress or egress to

property and in both instances the strips of land lay under water. It is true that appellee refers to the rule of the *Benedict* case as a dictum but in so doing appellee has overlooked the fundamental principle of that case.

Appellee has endeavored to distinguish the *Benedict* case by contending that an award there was made for the whole and that the problem before the Court was the proper apportionment of the award. Obviously, this is no distinction at all. The only difference between the *Benedict* case and the case at bar is that in the *Benedict* case only the Langley Estate and the city claimed an interest, whereas in the case at bar, in addition to the State, numerous land holders claimed an interest. The real point is that if the strips of land lying under the water were streets in the *Benedict* case then, as such, the city would only be entitled to nominal compensation, but if, as a matter of fact, all of the property lying under water is acreage then all of the owners are entitled to compensation for their proportionate share of the acreage. That is precisely what the Court held in the *Benedict* case and that is the point we are urging before this Court in the case at bar.

CONCLUSION.

It is respectfully urged that the judgment of the trial Court awarding nominal damages to the appellant, State of California, on Parcels 3A and 3B in case No. 22147, and Parcel 2 in case No. 22261, and

Parcel 2 in case No. 22416 be reversed and that this Court either find the value of this property or direct the trial Court to make such finding.

Dated, San Francisco, California,
May 12, 1948.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,
HAROLD B. HAAS,
Deputy Attorney General of the State of California,
MIRIAM E. WOLFF,
Deputy Attorney General of the State of California,
Attorneys for Appellant.